NCFM ENTERPRISE SDN BHD

v.

KEJURUTERAAN RASSHIN SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[SUIT NO: 22-131-2007-II]
26 MAY 2010

CIVIL PROCEDURE: *Execution - Garnishee proceedings - Ex parte summons - Whether first defendant should be served with a copy of the ex parte summons before hearing to make order nisi absolute*

CIVIL PROCEDURE: *Execution - Garnishee proceedings - Application to garnish money of first defendant in bank account - Whether money held in trust for other creditors - Rules of the High Court 1980, O. 49 r. 1*

CIVIL PROCEDURE: *Execution - Garnishee proceedings - Garnishee proceedings against government - Whether plaintiff could attach money owing from government to first defendant - Whether procedure adopted under O. 49 Rules of the High Court 1980 patently wrong - Rules of the High Court 1980, O. 73 rr. 2 & 13*

This was an appeal against the ruling of the Senior Assistant Registrar ('SAR') dismissing two applications to garnish monies allegedly due from two third parties to the first defendant. The facts showed that the plaintiff had issued a garnishee notice under O. 49 r. 1 of the Rules of the High Court 1980 ('RHC') with a view to garnish the money of the first defendant in the Affin Bank Bhd account (encl. 248). The plaintiff then filed another garnishee application (encl. 292) in which the garnishee was the Government of Malaysia. The plaintiff had deposed that a certain amount is owed by Federal Government to the first defendant. The first defendant objected to the applications of the plaintiff and submitted that (i) the plaintiff did not serve the *ex parte* application for an order to show cause on the first defendant; (ii) the money in the account at Affin Bank was held in trust for the other creditors; (iii) the plaintiff could not attach money owing from the Government to the first defendant because of the prohibition in O. 73 r. 13 of the RHC and s. 35 of the Government Proceedings Act 1956.

Held (allowing the appeal and making the order nisi in encl. 248 absolute; dismissing the appeal in respect of encl. 292):

(1) The garnishee *ie*, Affin Bank had been duly served and they indicated that they had no objection to the order being made absolute. Although the first defendant was not served with the *ex parte* summons, they were served with the order *nisi*. The rules or case law do not require that he should be served with a copy for the *ex parte* summons before the hearing to make the order nisi absolute. Therefore, the argument on the ground that the first defendant was not served should fail. (para 5)

(2) The money in the Affin Bank account belonged to the first defendant. The bank was holding it in trust for the first defendant. The creditors of the first defendant had no claim to the money unless they had obtained judgment and taken steps to attach the money in the account of the first defendant. Therefore, the first defendant could not be said to be holding the money in the account on behalf of the creditors. The other creditors had not moved the court to garnish the money in question and therefore the SAR should have simply dismissed the argument that the money was held for their benefit. (para 7)

(3) Order 49 RHC very clearly falls within the ambit of O. 73 r. 13 RHC. Therefore, O. 49 garnishment proceedings could not apply to the Federal Government or a State Government. Order 73 r. 2 RHC sets out the procedure to be followed under s. 35 of the Government Proceedings Act 1956 to restrain any person from receiving money payable to him by the Government and direct payment of the money to the applicant. The procedure adopted by the plaintiff to attach money due from the Government to the first defendant under O. 49 was patently wrong. (paras 10-12)

Case(s) referred to:

Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1989] 1 LNS 140 HC ***(refd)***

Malaysian Australian Finance Co Ltd v. The Law Union & Rock Insurance Co Ltd [1972] 1 LNS 83 HC ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Pritchard v. Westminster Bank Ltd [1969] 1 All ER 999 ***(refd)***

Shukeriah Abas v. Ketua Setiausaha Perbendaharaan & Ors [2000] 8 CLJ 551 HC ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, s. 35
Rules of the High Court 1980, O. 49 rr. 1, 3, O. 73 rr. 2, 13

Other source(s) referred to:
Halsbury's Laws of England, 3rd edn, vol 38, p 809

For the plaintiff - Bong Ah Loi; M/s Suhaili & Bong Advocates
For the 1st defendant - Hasiera Hashim; M/s Azmi & Co
For the garnishee (encl. 292) (Government) - Mohd Taufik Mohamed Yusoff SFC; AG's Chambers
For the garnishee (encl. 248) (Affin Bank) - Siti Hasmah Hasbee (Wendy Loh Yi Hwui with him); M/s David Allan, Sagah & Teng Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an appeal against the ruling of the learned Senior Assistant Registrar (SAR) to dismiss two applications (encls. 248 and 292) to garnish monies allegedly due from two third parties to the 1st defendant.

Brief Facts

[2] The plaintiff obtained judgment in the sum of RM1,007,978.59 against the 1st defendant on 14 December 2009. As the judgment was not satisfied, the plaintiff took steps to recover the judgment sum *vide* garnishee proceedings. The 1st defendant had an account with Affin Bank Bhd. The plaintiff issued a garnishee notice under O. 49 r. 1 Rules of the High Court 1980 with a view to garnish the money of the 1st defendant in the Affin Bank Bhd account. This is the application in encl. 248. After this application was filed, the 1st defendant applied for a stay of the execution. The hearing to make the order *nisi* absolute did not proceed until the stay application was dismissed on 1 March 2010. The plaintiff then filed another garnishee application (encl. 292). The garnishee in encl. 292 is the Government of Malaysia. The plaintiff has deposed in their affidavit that a sum of RM419,444.40 being retention sum of 5% is owed by Federal Government to the 1st defendant on account of a construction project. The application to make absolute the two garnishee orders was heard by the SAR on 8 March 2010. The garnishees and the 1st defendant were represented in this hearing.

A **Decision Of SAR**

[3] In respect of the money in the Affin Bank account, counsel for 1st defendant argued that the money was kept in trust for the benefit of other creditors. In respect of the balance of the retention sum of 5 per cent that is owed by the Federal Government to the 1st defendant, B counsel for 1st defendant argued that the account was not finalized as yet as no Final Payment Certificate was issued. The learned SAR accepted both arguments and proceeded to dismiss the application to make the said garnishee orders absolute. As an appeal against the decision of the SAR is a rehearing, I shall hear all the arguments afresh. C

Money Held By The 1st Defendant In The Affin Bank Account

[4] There is no dispute that the sum of RM295,569.39 is held in the account of the 1st defendant. Counsel for the bank told the SAR that the bank confirmed *vide* letter dated 29 January 2010 after service of D the Garnishee Order to Show Cause (the order nisi) that the plaintiff has a sum of RM295,569.39 in their bank and they have no objection to the order *nisi* being made absolute. Counsel for the bank also confirmed to me during the instant appeal hearing that she has no objection. The objection of the 1st defendant against the application of E the plaintiff to garnish this sum is as follows.

[5] The first ground is that the plaintiff did not serve the *ex parte* application for an order to show cause (Form 98) on the 1st defendant. However, counsel for defendant did not dispute that the order nisi itself F was served. In support she cited the case of *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1989] 1 LNS 140. However, in my opinion this authority does not support the argument of the defendant. Order 49 r. 3 only requires that the garnishee must be served the order nisi before the hearing to make the order absolute. In *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)*, VC George G J decided that not only must the order nisi be served on the garnishee before the hearing to make it absolute but the *ex parte* summons (Form 98) as well as the supporting affidavit must be served. However, O. 49 r. 3 does not require service of the nisi order or the *ex parte* summons on the defendant. In *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn* H *Bhd, Garnishee)*, the issue of service on the defendant was not raised and the court made no pronouncement whether the defendant is entitled to be served with the cause papers in respect of the garnishment proceedings. As stated above, in the instant case, the garnishee, ie, Affin Bank had been duly served and they indicated that they have no

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objection to the order being made absolute. I also note that although the 1st defendant was not served with the *ex parte* summons, they were served with the order nisi. Counsel for the 1st defendant appeared before the SAR to oppose the order nisi from being made absolute. If the 1st defendant wanted a copy of the *ex parte* summons and the supporting affidavit, he could have obtained it by making a search. The rules or case law do not require that he should be served with a copy for the ex-parte summons before the hearing to make the order nisi absolute. Therefore, the argument on the ground that the 1st defendant was not served should fail.

[6] The second ground of objection of counsel for 1st defendant is that the money in the account at Affin Bank was held in trust for the other creditors. The creditors are listed in the affidavit in opposition of the 1st defendant. In *Halsbury's Laws of England*, 3rd edn, vol 38 at p. 809 (cited in *Malaysian Australian Finance Co Ltd v. The Law Union & Rock Insurance Co Ltd* [1972] 1 LNS 83), a trust is defined as follows:

> When a person has property or rights which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights in trust for that other or those others, or for that purpose or those purposes, and he is called a trustee. A trust is a purely equitable obligation and is enforceable only in a court in which equity is administered.

[7] In the instant case, the money in the account belongs to the 1st defendant. In fact, it can be argued that the bank is holding it in trust for the customer, ie, the 1st defendant. The creditors of the 1st defendant have no claim to the money unless they have obtained judgment and taken steps to attach the money in the account of the 1st defendant. Therefore the 1st defendant cannot be said to be holding the money in the account on behalf of the creditors. The other creditors have not moved the court to garnish the money in question and therefore the learned SAR should have simply dismissed the argument that the money was held for their benefit. The plaintiff has moved this court to attach the money and therefore there is no reason why the interests of other creditors who may have been sleeping on their rights should be considered. As Lord Denning observed in the case of *Pritchard v. Westminster Bank Ltd* [1969] 1 All ER 999:

> The general principle, when there is no insolvency, is that the person who gets in first gets the fruits of his diligence: see per Lord Goddard, CJ in *James Bibby, Ltd. v. Woods (Howard, Garnishee)*.

[8] In my opinion, the objection of the ground that the money in the bank account is held on trust for other creditors is completely without any merit. I shall therefore allow the appeal and make the order *nisi* in encl. 248 absolute.

[9] In respect of the order *nisi* in encl. 292, the counsel for 1st defendant argued that the plaintiff cannot attach money owing from the government to the 1st defendant because of the prohibition in O. 73 r. 13 of the Rules of High Court 1980 and s. 35 of the Government Proceedings Act 1956 (revised 1988). Order 73 r. 13 reads as follows:

> **Rule 13. Attachment of debts, etc. (O. 73 r. 13)**
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> (1) No order:
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> (a) for the attachment of debts under Order 49; or
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> (b) for the appointment of a receiver under Order 30 or 51,
>
> shall be made or have effect in respect of any money due or accruing due, or alleged to be due or **accruing due, from the Government.** (emphasis added)

[10] The plaintiff has deposed that the 5 per cent retention sum amounting to RM419,444.40 is due from the Federal Government to the 1st defendant. Therefore, the garnishment proceeding under O. 49 very clearly falls within the ambit of O. 73 r. 13. Order 49 garnishment proceedings therefore cannot apply to the Federal Government or a State government. In fact O. 73 r. 2 sets out the procedure to be followed under s. 35 of the Government Proceedings Act 1956 (revised 1988) to restrain any person from receiving money payable to him by the Government and direct payment of the money to the applicant. Section 35 of the Government Proceedings Act 1956 (revised 1988) reads as follows in respect of the procedure to attach money due from the government:

> **35. Attachment of moneys payable by the Government**
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> (1) Where any money is payable by the Government to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Government were money payable by a subject, **be entitled under rules of court** to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the High Court may, subject to this Act and in accordance with rules of court,

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> make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person, or to the sequestrator or receiver. (emphasis added).

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[11] The italicised words must necessarily refer to O. 73 r. 2 which sets out the procedure to be followed under s. 35 to attach moneys payable by the Government. Counsel for plaintiff cited the case of *Shukeriah Abas v. Ketua Setiausaha Perbendaharaan & Ors* [2000] 8 CLJ 551 as authority for his argument that he should apply to attach the money due from the Federal government under O. 49 of the Rules of High Court 1980. In that case, the plaintiff obtained leave to execute a judgment after six years. However, the plaintiff did not proceed to file any garnishment proceedings against the judgment debtor. Instead she applied for consent from the Minister of Finance to proceed under s. 35 of the Government Proceedings Act 1956 (revised 1988). There was a lengthy delay during which period the money owed by the Government was apparently paid out to the judgment debtor. The plaintiff sued the Government for the loss occasioned by the delay. One of the issues in that case was whether the plaintiff should have waited for the consent from the Minister of Finance first before filing the garnishment application. The court was of the view that there was nothing to prevent the plaintiff from filing the action first, and applying for consent *via* the formal channels of communication or by applying for a subpoena against the Minister of Finance. In this case, the court clearly said that O. 49 garnishment would not apply against the Government because of the prohibition in O. 73 r. 13. This case is, therefore, not relevant to support the argument that the plaintiff can attach moneys due from the government under O. 49. In the more recent case of *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321 the Federal Court said that:

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> It must be noted that Orders 45 to 52 are orders pertaining to Enforcement of Judgments and Orders (O. 45), Writs of Execution: General (O. 46), Writs of Seizure and Sale (O. 47), Examination of Judgment Debtor, etc (O. 48), Garnishee Proceedings (O. 49), Changing Orders, Stop Orders, etc (O. 50), Receivers: Equitable Execution (O. 51), Rateable Distribution (O. 51A) and Committal (O. 52).

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> In other words, as against a Government one cannot resort to any of the procedures provided by Orders 45 to 52. The only procedure allowed is as provided by s. 33 GPA.

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[12] In the premises, the procedure adopted by the plaintiff to attach the money due from the Government to the 1st defendant under O. 49 is patently wrong. I therefore find it unnecessary to consider whether a debt was actually due from the Government to the 1st defendant at the time the application was made. I shall dismiss the appeal in respect of encl. 292. As both parties have partially succeeded in this appeal, I make no order as to costs.